

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF CITY OF EAST LANSING,

Plaintiff-Appellant,

v

ARTHUR ANDREW EUBANK, III,

Defendant-Appellee.

UNPUBLISHED

January 26, 2006

No. 256710

Ingham Circuit Court

LC No. 03-000380-AR

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Plaintiff appeals by leave granted from the circuit court order overturning defendant's district court jury conviction for operating a vehicle under the influence of intoxicating liquor or with unlawful blood alcohol content (OUIL/UBAC), MCL 257.625. We agree with the circuit court that the preliminary breath test (PBT) result should not have been admitted into evidence at defendant's trial. However, because we find that the error was harmless, we reverse the circuit court and reinstate defendant's conviction. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

There is no dispute with regard to the facts in this case. On October 10, 2002, East Lansing Police arrested defendant for operating a motor vehicle under the influence of alcohol or with unlawful blood alcohol content. A preliminary breath test administered at the time of the traffic stop yielded results of .11 percent alcohol per liter. Subsequent Breathalyzer tests at the police department indicated that defendant's blood alcohol content was .12 percent.

II. STANDARD OF REVIEW

A mixed standard of review is applied when considering evidentiary challenges based on questions of law:

The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion. However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo. Therefore, when such preliminary questions are at

issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. [*People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003) (citations omitted).]

III. ANALYSIS

During the trial, on cross-examination of the arresting officer, defendant asked one question about blood alcohol levels:

Q. Do you know if alcohol levels are constant in the human body?

A. They fluctuate.

On redirect examination of the officer, the prosecutor asked:

Q. Okay. With regards to, you answered a question, alcohol level – are alcohol levels constant in the human body, and you said no, they vary. What did you mean by that?

A. Well, basically your alcohol level, when you're drinking can go – goes up and it comes back down.

Q. Okay. But I mean, you don't mean like vary from one minute to the next, right?

A. No.

Q. You're talking about, like right now I don't have an alcohol level, but if I started drinking, I would get one?

A. Eventually, yes.

Q. Okay. After the alcohol goes into my stomach?

A. And it's through your body, through your system.

Moments later, plaintiff asked the court for conditional permission to introduce the PBT result if defendant raised the rising blood alcohol level defense in his closing argument. The court asked defendant if he would argue anything about the blood alcohol levels. Defendant responded "if the Court is asking, am I going to ask the jury that one of their duties is to determine that he was a UBAC at the time of driving, you bet." After the court decided that the PBT result could be admitted, defendant offered not to make any argument on the issue:

Defense Counsel: -- Mr. Yeadon said that if I mentioned it in closing he wanted it to come, and I won't mention it.

Plaintiff's Counsel: Well, Your Honor, given the Court's ruling I think – I think it is admissible and I'm going to ask that it be admitted.

The Court: Okay.

When the jury returned, plaintiff asked about the PBT result. The officer testified that the PBT result showed that defendant's blood alcohol content was .11 percent and the Breathalyzer test results showed it at .12 percent. Plaintiff again raised the issue in closing argument:

And there was a question asked about, well, can blood alcohol levels vary? And the officer said sure. The logical argument to that is, well, we don't know what his blood alcohol level was at the time he drove [be]cause they tested it a little while later. But as the officer indicated, he gave him a test at the roadside too, and that didn't vary by more than the allowable variance of that breathalyzer. So clearly his blood alcohol level was, in fact, above the legal limit, or blood alcohol content, I should say, was in fact, above the legal limit and we'd ask that you find him guilty.

MCL 257.625a(2)(b) states:

The results of a preliminary chemical breath analysis are admissible in a criminal prosecution for a crime enumerated in section 625c(1) or in an administrative hearing for 1 or more of the following purposes:

(i) To assist the court or hearing officer in determining a challenge to the validity of an arrest. This subparagraph does not limit the introduction of other competent evidence offered to establish the validity of an arrest.

(ii) As evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test was administered under subsection (6).

(iii) As evidence of the defendant's breath alcohol content, if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered under subsection (6).

The prosecutor argued for admission of the PBT results under subsection (iii). The only testimony elicited by defendant on cross-examination of a prosecution witness was the question "Do you know if alcohol levels are constant in the human body?" to which the officer answered, "They fluctuate." Defendant asked no further questions on this issue. This testimony did not provide a proper foundation for the admission of the PBT results under MCL 257.625a(2)(b)(iii). The question and answer did not suggest that defendant's blood alcohol level was lower at the time of driving than at the time of the Breathalyzer tests. Therefore, the circuit court did not err in finding that the condition for admissibility of the PBT result was not met and that the result should not have been admitted.

However, it is not enough for a defendant to show that the evidence should not have been admitted. Instead, “the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.” *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Defendant bears the burden of showing that the error resulted in a miscarriage of justice, i.e., it was outcome determinative. *Id.* at 493-496. In this case, the district court error in admitting the PBT result was harmless because defendant has not shown that, if the PBT result was excluded, his acquittal was more likely than not. The evidence at trial established that defendant was observed by the arresting officer leaving an East Lansing bar and driving with excessive speed and in a reckless manner. When defendant was pulled over, he smelled of alcohol and performed poorly on several sobriety tests. After being arrested and taken to the police station, defendant’s blood alcohol content was measured at .12 percent in two samples that were taken approximately one minute apart and less than one hour after his arrest. Given the strength of the prosecution’s proofs, which essentially went unchallenged by defendant, we hold that the erroneous admission of the PBT results was harmless. Defendant has not shown—as is his burden to do—that absent the error it was more probable than not that the jury would have voted to acquit him. *Lukity, supra*. Therefore, although we find that the PBT result should not have been admitted as a matter of law, the circuit court erred by failing to find that its admission was harmless.

Reversed and remanded to the district court for reinstatement of defendant’s conviction. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette